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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

NO. 799

CLINT W. MURCHISON, JR., ET AL., *Petitioners*,

VERSUS

MARK DOTTENHEIM, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Affidavit of Service	19
Conclusion	17
Question Presented	2
Question Not Presented	4
Reasons for Denying the Writ	6
(Sub-Head I)	6
(Sub-Head II)	7
(Sub-Head III)	12
Statutes and Rules Involved	7
Statement ~~Under States and Rules Involved~~	3

TABLE OF CASES

Page

American Construction Co. vs. Jacksonville T. & K. W. R. Co., 148 U.S. 372, 384 (1893) 2

Benisch vs. Cameron, 81 F. Supp. 883, 884, (D.C., S.D.N.Y. 1948) 6

Blau vs. Mission Corp. 212 F. 2d 77, 79 (C. A. 2, 1954), cert. den. 347 U. S. 1016 6

Commissioner vs. Rivera's Estate, 214 F. 2d 60, 63 (C.A. 2, 1954) 16

Erie vs. Tompkins, 304 U. S. 64 (1938) 5

Goldstein vs. Groesbeck, 142 F 2d 422, 425 (C. A. 2, 1944), cert. den. 323 U. S. 737 11

Great Northern R. C. vs. United States, 155 Fed. 945, 947 (C.A. 8, 1907), aff'd 208 U. S. 452 16

Heald vs. District of Columbia, 254 U. S. 20, 23 (1920) 15

Hoague-Sprague Corp. vs. Frank C. Meyer Co., 31 F 2d, 583m 585-6 (D. C., E. D. N. Y. 1929) 16

Home Owners Loan Corp. vs. Creed, 108 F. 2d 153 16

Kogan vs. Schulte, 61 F. Supp. 604, 610 (D.C., S.D. N.Y., 1945) 6

Magida vs. Continental Can Co., Inc., C.C.H. Fed. Sec. L. Rep., vol. 4, par. 90, 725, pp. 92225, 92228, (D.C., S.D.N.Y., Op. of Aug 3, 1955) 6

TABLE OF CASES—Continued

Page

Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 284 (1897) 2

Pellegrino vs. Nesbit, 203 F 2d 463, 466 (C.A. 9, 1953) 6

Rogers vs. United States, 185 U.S. 83, 87, 89 (1902) 16

Rosenberg vs. United States, 346 U. S. 273, 294 (1953) 15

United States vs. LeBris, 121 U. S. 278, 280 (1887) 15

Washington vs. Miller, 335 U.S. 422, 428 (1914) 16

AUTHORITIES

	Page
40 A.L.R. 2d 1346, 1358 (1955)	7
Cook & Feldman, Statutory Inhibitions Upon Unfair Use of Corporation Information by Insiders, 66 Harv. L. Rev. (1953), 385, 411	7
62 Harvard Law Rev. (1949), 1071	7
Loss, Securities Regulation (1951), p. 566	7
3 Moore's Fed. Pr. (2d Ed.), 1955 Supp., par. 23.18, p. 146	7
3 Moore's Fed. Pr. (2d Ed.) 1948, par. 23.01, p. 3406	14
3 Moore's Fed. Pr. (2d Ed.), Sec. 23.15(2), pp. 3493, et seq.	5
Rubin and Feldman, Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders. 95 Univ. Penn. L. Rev. (1947), 468, 473-4	7

STATUTES AND RULES

Page

FEDERAL RULES OF CIVIL PROCEDURE

Rule 16(b) 14

Rule 23(b) 3, 5, 6, 12, 13, 14, 17

Rule 23(b) 1938 14

EQUITY RULES

Rule 27 (198 Fed. XXV) 14

Rule 94 (104 U. S. IX) 14

STATUTES

SECURITIES AND EXCHANGE ACT OF 1934

15 U.S.C. Sec. 78c(a) 3(a)(10) 8

15 U.S.C. Sec. 78p(b) 3

Rule Making Statute, 28 U.S.C. (1927) Sec. 723b; Now 28 U.S.C. (1948) Sec. 2072 12

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Petitioners seek a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit which unanimously reversed a judgment of the District Court for Northern Texas dismissing the complaint for legal insufficiency.

The decision below was interlocutory. Certiorari "is and generally should be issued only after a final decree"; *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 284 (1897). The review of interlocutory decisions is allowed only where "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). No such extraordinary circumstances have been shown. On the contrary, if petitioners should ultimately be held to be free of substantive liability, the action will be dismissed and the legal issues now presented to this Court will be academic.

We shall demonstrate that the decision below is not only intrinsically sound, but is in accord with the holdings of the Courts of Appeals for the Second and Ninth Circuits; with the holdings of the District Court for Southern New York; and with the views of all text writers who have considered the question.

Question Presented.

The three questions formulated by petitioners (Pet. 2-3) are inapposite because they evade what petitioners themselves describe as "the basic issue" (Pet. 7-8). The case presents only one question:

> In an action under § 16(b) of the Securities Exchange Act of 1934, must the plaintiff security

holder allege - as provided in Rule 23(b) F.R.C.P. - that he was a shareholder at the time of the transaction of which he complains?

Statutes and Rules Involved.

The text of the statutes and rules involved in this case is set forth at pages 3-7 of the Petition.

Statement.

This action was brought by respondent, a stockholder of Kirby Petroleum Company, to recover, on Kirby's behalf, insiders' short-swing profits which petitioners, defendants below, had realized in violation of § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p (b).

Upon petitioners' motion, the District Court dismissed the complaint on the ground that it failed to allege, as provided in Rule 23(b) F.R.C.P., that plaintiff was a stockholder of Kirby at the time of the transaction of which he complains.[1] 131 F. Supp. 790.

The Court of Appeals reversed, 227 F. 2d 737. It held that Rule 23(b) does not apply to a security holder's action brought pursuant to § 16(b). The Court below, quoting from earlier authorities, noted that § 16(b) permits suit by "the owner of *any* security", which includes the

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(1) An additional ground of dismissal - the alleged lack of verification of the complaint - was abandoned by petitioners in their brief on appeal below.

owner of recently acquired stock. The right of action under 16(b) "was primarily intended as an instrument of statutory policy of which the general public is the ultimate beneficiary. Congress did not intend procedural restrictions to hamper such policy." 227 F. 2d, at 740, fn. 4 and 5.

The Court below also rejected petitioners' argument that the promulgation of Rule 23(b) in 1938 superseded the earlier enacted § 16(b). The Court held that Rule 23(b) deals with the traditional stockholder's derivative action which is an invention of equity (227 F. 2d, at 739). On the other hand, § 16(b) "created a new cause of action which, while similar in some respects to a secondary or derivative right", is "neither derivative nor secondary in the sense in which that term is used in the Rule" (227 F. 2d, at 738, 739). Since the statute and the Rule thus deal with different subject matters, "there is no conflict between the rule and the law". Both are effective within their respective spheres of application.

Questions Not Presented.

Petitioners ascribe to the Court below a holding that Rule 23(b) applies only in diversity of citizenship cases (Pet. 9, 13); and they ask this Court to decide whether the Rule should be so limited (Pet. 2, Question "1").

The question thus posed by petitioners is wholly inapposite. The Court below did *not* hold that Rule 23(b)

is limited to diversity cases. It merely held that a security holder's action under § 16(b) is not the type of suit envisaged by the Rule. The broad question formulated by petitioners is therefore not involved in the case at bar.

Equally inapposite is petitioners' lengthy discussion (Pet. 9-21) whether the Rule 23(b) requirement of stock ownership at the time of the wrong is substantive or procedural in nature. That discussion might become relevant in a diversity case where it might be argued that the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), compels a federal court to follow the substantive law of the State even though it be incompatible with Rule 23 (b).[1] In this case, however, the problem does not arise. Jurisdiction is *not* based on diversity of citizenship; the *Erie-Tompkins* doctrine is therefore inapplicable. Petitioner's extensive argument of this question is but a transparent attempt to arouse this Court's interest in a pretended issue which has actually nothing to do with this case.

Whether the "endless confusion and complexity surrounding Rule 23(b)", claimed by Petitioners (Pet. 17), is real or fancied is not a matter for consideration here; for, as we now proceed to show, *all authorities* agree, without contradiction, that a § 16(b) plaintiff need not allege stock ownership at the time of the transaction complained of.

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(1) See 3 Moore's Fed. Pr. (2d Ed.), Sec. 23.15(2), pp. 3493 et seq.

REASONS FOR DENYING THE WRIT

I.

THE DECISION IS IN ACCORD WITH THE UNANIMOUS HOLDINGS OF ALL AUTHORITIES.

Rule 23(b) F.R.C.P. provides that the complaint in a stockholder's derivative action shall allege "that the plaintiff was a shareholder at the time of the transaction of which he complains". The Court below held that this requirement does not apply to an action brought by a security holder under § 16(b) of the Exchange Act. All the authorities which have considered the question are in agreement with this holding:

Blau v. Mission Corp., 212 F. 2d 77, 79 (C.A. 2, 1954), cert. den. 347 U.S. 1016;

Pellegrino v. Nesbit, 203 F. 2d 463, 466 (C.A. 9, 1953);

Benisch v. Cameron, 81 F. Supp. 882, 884 (D.C., S.D.N.Y., 1948);

Kogan v. Schulte, 61 F. Supp. 604, 610 (D.C., S.D. N.Y., 1945);

Magida v. Continental Can Co., Inc., CCH Fed. Sec. L. Rep., vol. 4, par. 90725, pp. 92225, 92228 (D.C., S.D.N.Y., Op. of Aug. 3, 1955);

Rubin and Feldman, Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders, 95 Univ. Penn. L. Rev. (1947), 468, 473-4;

Cook and Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. (1953), 385, 411;

Note, 62 Harv. L. Rev. (1949), 1071;

Note, 40 A.L.R. 2d 1346, 1358 (1955);

Loss, Securities Regulation (1951), p. 566;

3 *Moore's Fed. Pr.* (2d Ed.), 1955 Supp., par. 23.18, p. 146.

We respectfully call the Court's special attention to the careful reasoning in the article by *Rubin and Feldman, supra*, and in the District Court's decision in *Benisch, supra*. The grounds there set forth are the fountainhead for the later decisions in *Pellegrino, supra*, in *Blau, supra*, and in the decision of the Court below. Petitioner's brief completely ignores these arguments.

II.

THE LANGUAGE AND PURPOSE OF § 16(b) OF THE EXCHANGE ACT PRECLUDE THE APPLICATION OF RULE 23(b) F.R.C.P.

1. Petitioners contend that the security holder's action authorized by § 16(b) of the Exchange Act is nothing

more nor less than the shareholder's secondary or derivative action which is regulated by Rule 23(b) F.R.C.P. Petitioners deduce from that premise that the § 16(b) action brought by a security holder is subject to all the requirements of Rule 23(b). The contention, we submit, is altogether untenable.

§ 16(b) and Rule 23(b) deal with different subject matters. Rule 23(b) regulates the conventional stockholder's derivative action which may be brought on equitable grounds where the corporate management improperly fails or refuses to enforce a claim belonging to the corporation. This action is a creature of equity; and Rule 23 (b) defines the conditions under which it may be maintained.

Otherwise is the security holder's action under § 16(b). It is a statutory creature. It can be brought not only by a shareholder, but by "the owner of any security of the issuer"; and under the broad statutory definition[1], the term "security" includes bonds and debentures. A bondholder or a debenture holder can thus qualify as plaintiff under § 16(b). Since such a plaintiff cannot allege that he was a "shareholder" at the time of the wrong, it is plain that such an allegation is not necessary in a § 16 (b) action.

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(1) Sec. 3(a)(10) of the Exchange Act, 15 U.S.C. Sec. 78c(a)(10) provides:

"The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing

Nor is this all. Rule 23(b) requires the plaintiff in a conventional stockholder's derivative action to set forth with particularity his efforts to secure from the directors and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action, or the reasons for not making such effort. By contrast, a § 16(b) plaintiff need allege no more than that he requested the corporation to bring suit and that it failed to do so within sixty days thereafter.

It is thus clear that § 16(b) not only created a new cause of action, but that it prescribed at the same time its own code of procedural prerequisites by which the new statutory cause of action was to be governed.

Plainly it would be impossible to superimpose the requirements of Rule 23(b) upon the statutory scheme of § 16(b). The Rule deals only with shareholders, while the statute applies to the owner of *any* security. The Rule

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agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

requires the complete exhaustion of all intra-corporate remedies, together with a statement of the reasons for their failure; the statute is satisfied with a demand which remains unsatisfied for sixty days. Any attempt to write Rule 23(b) into § 16(b) would destroy the carefully devised plan of the statute.

2. § 16(b), as we have said, permits suit by "the owner of *any* security". The statute thus does not distinguish between securities recently acquired and those held at the time of the transaction complained of. The holder of either kind of security may bring the action.

Congress had a valid reason for discarding any distinction between recent security holders and those of long standing. The fundamental purpose of § 16(b) is to compel the surrender of insiders' short-swing profits. But the insiders, holding the control of the corporation, could not be expected to enforce the statute against themselves. To put teeth into the statute, its enforcement had to be entrusted to others; and this watch dog class had to be sufficiently broad and numerous to assure the likelihood that violations would be detected and corrected. Hence it is that the statute enlists *all* security holders as agents for its enforcement, regardless of the peculiar interest which may be present or absent in the person of any individual security holder.

That such is the underlying purpose of § 16(b) is evidenced by the fact that even a mere debenture holder is authorized to bring the suit. The ordinary "shareholder's suit in essence is nothing more than a suit by a beneficiary of a fiduciary to enforce a right running to the fiduciary as such"; *Goldstein v. Groesbeck*, 142 F. 2d 422, 425 (C.A. 2, 1944), cert. den. 323 U.S. 737. In other words, a stockholder's right to bring the traditional derivative suit rests upon his equitable or beneficial interest in the claims belonging to his corporation. But a debenture holder is a simple creditor; he has no equitable or beneficial interest in the corporate assets; and his claim against the corporation (if it is solvent) is not enhanced or improved if insiders' short-swing profits are channelled into the treasury of the corporation. Nevertheless, § 16(b) permits suit by a debenture holder. That is clear evidence that the statute uses the security holders merely as instruments to effectuate its fundamental policy.

Since Congress thus reached out to qualify even a mere debenture holder as plaintiff under § 16(b), it follows *a fortiori* that a holder of recently acquired stock is equally qualified. The language of § 16(b) - giving the right to sue to "the owner of *any* security" - is certainly broad enough to include the owner of recently acquired stock; and such a stockholder can perform the statutory function of enforcing § 16(b) claims quite as affectively as a security holder of long standing. Neither the language nor

the purpose of the statute thus affords any basis for the distinction which petitioners advocate.

III.

THE PROMULGATION OF RULE 23(b) DID NOT OPERATE AS A PARTIAL REPEAL OF § 16(b).

§ 16(b) was enacted in 1934. Rule 23(b) was promulgated in 1938 as part of the Federal Rules of Civil Procedure. The Rule-Making-Statute[1] provides that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Petitioners contend that Rule 23(b) is in conflict with § 16(b) and that, to the extent of such conflict, the statute was repealed by the Rule. If the contention were to be sustained, its effect would be grave indeed. In enacting § 16(b), Congress intended to give the right of action to any security holder; Rule 23(b) would now restrict that right to stockholders. In enacting § 16(b), Congress did not differentiate between security holders of recent vintage and those of long standing; Rule 23(b) would now import that distinction into the statute. In enacting § 16(b), Congress intended to give the security holders an absolute right of action after a sixty days' waiting period; Rule 23(b) would now require the complete exhaustion of all intracorporate remedies before the action

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(1) 28 U.S.C. (1927), Sec. 723b; now 28 U.S.C. (1948), Sec. 2072.

can be brought. In short, petitioners contend that the adoption of Rule 23(b) by this Court was designed completely to eliminate the procedural scheme so carefully drawn by Congress in enacting § 16(b).

Fortunately, it is unnecessary to draw the extreme conclusions which petitioners advocate. Petitioners' contention that Rule 23 repeals any part of § 16(b) is untenable.

1. The Rule-Making-Statute, *supra*, presupposes a conflict between the Rule and an earlier statute. The Court below properly held that there exists no conflict between Rule 23(b) and § 16(b). Rule 23(b) as we have said, deals with the conventional stockholder's action created by equity. § 16(b), on the other hand, created an entirely new procedural device, namely, a security holder's action. As we have shown, § 16(b) authorizes suits not only by the owners of stock, but also by the owners of bonds, debentures, or other securities. These security holders are authorized to sue under § 16(b), not because they have an equitable interest in the corporate assets - the holders of bonds or debentures have no such equitable interest - but because Congress, for the reasons already stated, saw fit to give them this right. Rule 23(b) was not designed to deal with such a security holder's action of purely statutory origin. There is, therefore, no conflict between the two provisions; each of them is and remains applicable within its own field of operation.

2. But let it be assumed, for argument's sake, that there exists a conflict between § 16(b) and Rule 23(b). Even so the origin and history of Rule 23(b) make it plain that the Rule was not designed to supersede § 16(b).

Although Rule 23(b) went into effect in 1938, it was nothing but a continuation of Equity Rule 27 (198 Fed. XXV) which, in turn, was a continuation of Equity Rule 94 (104 U.S. IX). See 3 *Moore's Fed. Pr.* (2d Ed., 1948), par. 23.01, p. 3406. As stated in the *Official Committee Note of 1946* to Rule 23(b) F.R.C.P.:

> "The provision in Equity Rule 94 was later embodied in Equity Rule 27, of which the present Rule 23 is substantially a copy."

Equity Rule 94 dates back to 1882. In 1913 it was replaced by Equity Rule 27. Both Rules thus predated § 16(b) of the Exchange Act by many years. There can be no question but that, upon the enactment of the Exchange Act in 1934, the provisions of its § 16(b) superseded any inconsistent provisions of Equity Rule 27. Petitioners themselves do not deny that, from 1934 until at least 1938, § 16(b) was in full force and effect as written and that Equity Rule 27 was inapplicable to actions under § 16(b).

Was this state of the law changed by the promulgation of the Federal Rules of Civil Procedure in 1938? There is absolutely nothing in the Federal Rules to indicate such an intention. Rule 23(b) is but a reenactment, with

minor verbal changes, of Equity Rule 27. It is inconceivable that this reenactment - consisting of little more than a renumbering - should have been intended to achieve the repeal by implication of important parts of § 16(b) of the Exchange Act.

We have but recently been reminded of the "cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible * * * The intention of the legislature to repeal 'must be clear and manifest.'" *Rosenberg v. United States*, 346 U.S. 273, 294 (1953). There is not one word in the Rules themselves or in the underlying legislative materials to suggest that Rule 23(b) was to have a broader sweep than its predecessor, Equity Rule 27. Since Equity Rule 27 was inapplicable to actions under § 16(b), its successor Rule 23(b) is equally inapplicable. Any contrary view would run afoul of the elementary principle that "reenacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested"; *United States v. LeBris*, 121 U.S. 278, 280 (1887); *Heald v. District of Columbia*, 254 U.S. 20, 23 (1920).

3. The same conclusion is fortified by an additional ground. It is an elementary principle that special legislation, dealing specifically with a narrow subject (such as actions for short-swing profits of corporate insiders),

is not to be deemed repealed by later general legislation dealing broadly with a general subject (such as stockholders' actions), although the general subject may encompass the special. As was held in *Washington v. Miller*, 235 U.S. 422, 428 (1914):

> "* * * where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (citing authorities)."

Accord:

Rogers v. United States, 185 U.S. 83, 87-89 (1902);

Commissioner v. Rivera's Estate, 214 F. 2d 60, 63 (C.A. 2, 1954);

Home Owners Loan Corp. v. Creed, 108 F. 2d 153, 155 (C.A. 5, 1939).

In the application of this principle it makes no difference that the later general statute contains a clause expressly repealing all earlier inconsistent statutes; *Great Northern R. Co. v. United States*, 155 Fed. 945, 947 (C.A. 8, 1907), aff'd 208 U.S. 452; *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F. 2d 583, 585-6 (D.C., E.D.N.Y., 1929).

The rule is based on solid reason. Take its application to the case at bar. A legislative body - here, this Court and Congress - proceeds to regulate the general subject

of stockholders' actions. It finds that the provisions theretofore in effect are adequate and so it reenacts them. But its attention is not focused on the special subject of § 16(b) actions. Congress has previously determined that this specific type of litigation is subject to peculiar policy considerations requiring regulation different from that governing the run-of-the mill stockholders' actions. This Congressional determination is as valid now as it was then. There is no indication that this Court, in enacting Rule 23(b), gave any thought to the special problems surrounding actions under § 16(b). There is no indication that this Court intended to re-evaluate and to reverse the judgment of the Congress embodied in § 16(b). This Court dealt only with the general subject of stockholders' leaving unaffected the special subject of security holders' actions for the recovery of short-swing profits of corporate insiders. Under the sound principle of *Washington v. Miller, supra*, and the authorities cited, the special provisions of § 16(b) are not repealed by the later general regulation contained in Rule 23(b); the special provisions of § 16(b) remain in force as an exception to the general provisions of Rule 23(b).

CONCLUSION

We submit that the decision below is sound; and it is in accordance with all of the numerous and uncontradicted authorities we have cited. By moving to dismiss the complaint for legal insufficiency, petitioners admitted the

truth of its charges. They seek to escape liability not by attempting to justify their conduct, but by a personal attack upon the plaintiff. To permit such an attack would undermine the salutary policy of the statute and would permit defendants to go scot-free. It is respectfully submitted that the petition should be denied.

Dated:

April 12, 1956

Respectfully submitted,

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HAROLD B. SANDERS, SR.

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AFFIDAVIT OF SERVICE OF RESPONDENT'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

BEFOLE ME, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Harold Barefoot Sanders, Jr., who, being by me duly sworn, upon his oath deposes and says that on the ——— day of April, 1956, he delivered to Hon. Franklin E. Spafford and Hon. Donald G. Gay, 1310 Kirby Building, Dallas, Texas, attorneys for Petitioners in the above cause, a true copy of the foregoing brief in opposition to writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

.....

Harold Barefoot Sanders, Jr.

Subscribed and sworn to before me by the said Harold Barefoot Sanders, Jr., this ——— day of April, 1956, to certify which witness my hand and seal of office.

.....

Notary Public in and for Dallas County, Texas.